

**STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF STATE PROCUREMENT
MARKUP RULE 2015-3
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW
Agency Code 006.27**

Pursuant to the authority vested in the Director of the Office of State Procurement by Ark. Code Ann. § 19-11-217 and in compliance with the Administrative Procedure Act, Ark. Code Ann. § 25-15-201 et seq., the Director of the Office of State Procurement, with the approval of the Director of the Department of Finance and Administration, as evidenced by his signature below, does hereby promulgate, amend, and rescind, the following rules for the enforcement and administration of the Arkansas Procurement Code.

R2:19-11-203. Capital Improvements.

Under subsection (14)(Y), capital improvements valued at less than twenty thousand dollars (\$20,000) subject to Department of Finance and Administration Building Authority Division minimum standards and criteria are exempt from the requirements of the Procurement Law.

R3:19-11-204. Procedures for approval of information technology products or services obtained by requests for qualification.

(Rescinded)

R13:19-11-229. Procedures for approval of information technology products or services obtained by competitive sealed bids.

(Rescinded)

R11:19-11-230. Procedures for approval of information technology products or services obtained by competitive sealed proposals.

(Rescinded)

R3:19-11-232. Procedures for approval of information technology products or services obtained by sole source.

(Rescinded)

R1:19-11-233. Emergency procurements.

(a) BIDS. The state agency must, at a minimum, receive three (3) competitive bids unless the emergency is critical. The quotation abstract must show the names of at least three (3) firms contacted in attempting to obtain competition.

(b) APPROVAL. All emergency procurements shall be approved in advance by the State Procurement Director, the head of a procurement agency, or a designee of either officer. Where time or circumstance does not permit prior approval, approval must be

obtained at the earliest practical date. Requests for approval shall be made in writing and shall include:

- (1) a copy of the purchase order;**
- (2) a copy of the quotation abstract; and**
- (3) a written explanation of the emergency.**

(c) TIE BIDS.

(1) Definitions: As used in this section

(i) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and

(ii) "Out-of-state company" means all foreign entities as defined by Arkansas law.

(2) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.

(3) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award shall be made to that Arkansas company.

(4) In the event of a tie bid between two or more offers that meet the specifications as required

(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;

(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.

(5) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.

(d) PROFESSIONAL AND CONSULTANT SERVICES. Emergency procurements of professional and consultant services with a total projected contract amount, including any amendments or possible extensions, of less than fifty thousand dollars (\$50,000) may be procured using the method as described in R1:19-11-233(A) through (C). For those PCS contracts with a total projected contract amount, including any amendments or possible extensions, of fifty thousand dollars (\$50,000) or more, the agency chief fiscal officer or equivalent or director, division director or deputy director of an agency, college or university may institute a request for emergency action review of a professional or consultant service contract by providing in writing a request to the Director of State Procurement. The request must detail that to procure using other methods would endanger human life or health, state property or the functional capability of the agency. The State Procurement Director may then approve submission of the contract to the Legislative Council. Under its emergency action procedures, the Co-chairpersons of the Legislative Council and/or the Co-chairpersons of the Legislative Council Review Committee may review PCS contracts on behalf of the Legislative Council, provided a written report of the review process is presented to the Legislative Council at its next regular meeting.

(e) TECHNICAL AND GENERAL SERVICES. Emergency procurements of technical and general services with a total projected contract amount, including any amendments or possible extensions, of less than one hundred thousand dollars (\$100,000) may be procured using the method as described in R1:19-11-233(A) through (C). For those technical and general services contracts with a total projected contract amount,

including any amendments or possible extensions, of one hundred thousand dollars (\$100,000) or more, the agency chief fiscal officer or equivalent or director, division director or deputy director of an agency, college or university may institute a request for emergency action review of a technical and general services contract by providing in writing a request to the Director of State Procurement. The request must detail that to procure using other methods would endanger human life or health, state property or the functional capability of the agency. The State Procurement Director may then approve submission of the contract to the Legislative Council. Under its emergency action procedures, the Co-chairpersons of the Legislative Council and/or the Co-chairpersons of the Legislative Council Review Committee may review technical and general services contracts on behalf of the Legislative Council, provided a written report of the review process is presented to the Legislative Council at its next regular meeting.

R2:19-11-249. Reporting of Cooperative Contract Purchases.

Cooperative contract purchases must be presented to the Legislative Council or Joint Budget Committee by the Department of Finance and Administration Office of State Procurement quarterly. Agencies shall submit purchases using the appropriate method as determined by the Office of State Procurement.

R1:19-11-251. Intergovernmental agreements.

(a) Intergovernmental agreements should include at a minimum:

- (1) Scope of work to be accomplished;***
- (2) Amount of compensation (if any);***
- (3) Delineation of responsibilities and duties of each entity;***
- (4) Term of agreement; and***
- (5) Authorized signatures from each entity.***

(b) (1) Intergovernmental agreements for technical and general services with a total projected contract amount, including any amendments and possible extensions, of one hundred thousand dollars (\$100,000) or more will be submitted to the Office of State Procurement prior to contract execution for review by the Legislative Council or Joint Budget Committee.

(2) Intergovernmental agreements involving professional and consultant services with a total projected contract amount, including any amendments and possible extensions, of fifty thousand dollars (\$50,000) or more will be submitted to the Office of State Procurement prior to contract execution for review by the Legislative Council or Joint Budget Committee.

(3) Intergovernmental agreements involving commodities will not be submitted to the Office of State Procurement prior to contract execution.

R1:19-11-265. Review Requirements of Technical and General Services Contracts that are Amended.

(a) Amendments to contracts that were originally reviewed by Legislative Council or Joint Budget Committee. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and

Administration and before the execution date of the amendment if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.

(b) Amendments to contracts that originally did not require review by Legislative Council or Joint Budget Committee. Any amendment which increases the total projected contract amount, including any amendments or possible extensions, of a technical and general services contract to one hundred thousand dollars (\$100,000) or more shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment along with a copy of the original contract and any attachments thereto must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R5:19-11-265. Contracts that have expired cannot be amended.

R2:19-11-265. Technical and General Services Contract Form.

Each contract presented for review should be submitted using the appropriate contract form as specified by the Office of State Procurement. Contract forms are available on the OSP website.

R4:19-11-265. Reporting of Contracts for Commodities including Services with a projected total cost greater than \$250,000.

(Rescended)

R5:19-11-265. Contract Dates.

For each technical and general services contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:

(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the Department of Finance and Administration Office of State Procurement in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;

(b) All technical and general services contracts with a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000) or more unless specifically exempted, must be filed with the Department of Finance and Administration Office of State Procurement for review by the Legislative Council or Joint Budget Committee.

R6:19-11-265. Reporting of Technical and General Services Contracts.

Technical and general services contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) and less than one hundred thousand dollars (\$100,000) shall be reported to the Legislative Council or the Joint Budget Committee monthly. Agencies shall report contracts using the appropriate method as determined by the Office of State Procurement.

***R7:19-11-265. Technical and General Services Contracts
on File in the Office of State Procurement.***

All agencies will be required to maintain copies in accordance with current document retention laws (Ark. Code Ann. § 19-11-214), of all purchase orders issued for the procurement of technical and general services.

R1:19-11-267. Use of Performance-Based Standards in Contracts.

(a) All technical and general services contract, including any amendments or possible extensions, shall include performance standards. The purpose of these standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.

(b) Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.

(c) Performance standards should measure, at prescribed points throughout the term of the contract, the quality, quantity, and timeliness of work being performed.

(d) Performance standards may be refined by the agency and the provider as a part of the contract negotiations.

(e) A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.

(f) Contracts that may be exempt from the use of performance standards include:

(1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider.

(2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.

R1:19-11-268. Reporting of Vendor Performance.

Contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) or more shall require the submission of a vendor performance report at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract. Reports shall be due to the Office of State Procurement. This shall not restrict agencies from submitting an

unsatisfactory vendor performance report at any time during the contract period. Agencies shall submit vendor performance reports using the appropriate method as prescribed by the Office of State Procurement.

R1:19-11-269. Procedures for approval of information technology products or services.

Agencies must submit to the Department of Finance and Administration Office of Intergovernmental Services State Technology Planning (STP) any bid solicitation, sole source, exempt by law purchase, intergovernmental agreement, or cooperative contract purchase for Information Technology products or services where the total projected contract amount, including any amendments or possible extensions, is one hundred thousand dollars (\$100,000) or more. In addition, any bid solicitation, sole source, exempt by law purchase, intergovernmental agreement, or cooperative contract purchase that includes Information Technology products or services as part of the purchase, where that part is anticipated to have a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000.00) or more must be submitted to STP for approval.

STP will provide approval through the state's financial management system. STP shall have ten (10) business days from receipt of the documents to complete the necessary reviews. If the STP review is not completed within the time frame allowed, the agency and STP must mutually agree to an extension of the review process.

R1:19-11-272. Experience Requirement.

Prior to the release of a bid solicitation, if the agency justifies in writing that the combined experience of the key personnel would be insufficient to adequately satisfy the requirements of the bid solicitation, the agency must include in the bid solicitation a statement indicating that only the experience of the bidder or offeror shall be considered.

R1:19-11-801. DFA Building Authority Division Criteria.

The guidelines and procedures established by the Department of Finance and Administration Building Authority Division shall be used by all agencies, except those exempt from Building Authority Division review, in selecting architects, land surveyors and engineers for state construction projects. Refer to Architectural Section 6-100 of Building Authority Division Standards and Criteria Professional Services Selection Procedures for State Agencies.

R2:19-11-801. Procedures for Approval of Architects, Interior Designers, and Engineers and Land Surveyor Contracts.

With the exception of those agencies exempt from Building Authority Division review all contracts for architectural, interior design, and engineering and land surveyor services must be first reviewed by the Department of Finance and Administration

Building Authority Division for its recommendation and approval as to the propriety and legality of the contract. Agencies shall submit contracts requiring Building Authority Division review in accordance with the time guidelines as prescribed on the Office of State Procurement website. After receiving the recommendation and approval of the Building Authority Division, the Office of State Procurement shall review and prepare such contracts for their ultimate submission to the Legislative Council or the Joint Budget Committee.

In the event the Building Authority Division refuses to give a favorable recommendation to the propriety of the contract, the agency involved may request the Legislative Council to review the decision of the Building Authority Division. The Legislative Council may then request the Department of Finance and Administration Building Authority Division to review their previous decision, abide by the decision of the Building Authority Division, or request the agency to make changes in the contract.

In no event shall the Department of Finance and Administration Building Authority Division have the final authority to deny a contract solely on the basis of its propriety.

R1:19-11-1006. Performance Evaluation and Expenditure Review of Professional and Consultant Service Contracts.

Professional and consultant service contracts between state agencies for which the total projected contract amount, including any amendments or possible extensions, is fifty thousand dollars (\$50,000) or more, must be presented to the Performance Evaluation and Expenditure Review Committee (PEER) or Joint Budget Committee by the Department of Finance and Administration prior to the execution date of such contract.

R2:19-11-1006. Review Requirements of Professional and Consultant Service Contracts that Are Amended.

(a) AMENDMENTS TO CONTRACTS THAT WERE ORIGINALLY REVIEWED BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration and before the execution date of the amendment if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.

(b) AMENDMENTS TO CONTRACTS THAT ORIGINALLY DID NOT REQUIRE REVIEW BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. Any amendment that increases the total projected contract amount, including any amendments or possible extensions, of a professional or consultant service contract to fifty thousand dollars (\$50,000) or more shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment, along with a copy of the original contract and any attachments thereto, must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R12:11-19-1012. Contracts that have expired cannot be amended.

R3:19-11-1006. Reporting of Professional and Consultant Service Contracts.

Professional and consultant service contracts with a total projected contract amount, including any amendments or possible extensions, of ten thousand dollars (\$10,000) but less than fifty thousand dollars (\$50,000) shall be reported to the Legislative Council or the Joint Budget Committee monthly. Agencies shall submit contracts using the appropriate method as determined by the Office of State Procurement.

R1:19-11-1008. Procedures for Approval of Architects, Interior Designers, Engineers and Land Surveyor Contracts.

(a) With the exception of those agencies exempt from Building Authority Division review, all contracts for architectural, interior design, and engineering and land surveyor services must be first reviewed by the Department of Finance and Administration Building Authority Division for its recommendation and approval as to the propriety and legality of the contract. Agencies shall submit contracts requiring Building Authority Division review in accordance with the time guidelines as prescribed on the Office of State Procurement website. After receiving the recommendation and approval of the Building Authority Division, the Office of State Procurement shall review and prepare such contracts for their ultimate submission to the Legislative Council or the Joint Budget Committee.

(b) In the event the Building Authority Division refuses to give a favorable recommendation to the propriety of the contract, the agency involved may request the Legislative Council to review the decision of the Building Authority Division. The Legislative Council may then request the Department of Finance and Administration Building Authority Division to review their previous decision, abide by the decision of the Building Authority Division, or request the agency to make changes in the contract.

(c) In no event shall the Department of Finance and Administration Building Authority Division have the final authority to deny a contract solely on the basis of its propriety.

R1:19-11-1010. Use of Performance-Based Standards in Professional and Consultant Service Contracts.

(a) All professional and consultant service contracts shall include performance standards. The purpose of these standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.

(b) Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.

(c) Performance standards should measure, at prescribed points throughout the term of the contract, the quality, ~~and~~ quantity, and timeliness of work being performed.

(d) Performance standards may be refined by the agency and the provider as a part of the contract negotiations.

(e) A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.

(f) Contracts that may be exempt from the use of performance standards include:

(1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider.

(2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.

(3) Architectural and Engineering contracts that are awarded using Building Authority Division criteria or similar criteria developed by those colleges and universities which are exempt from Building Authority Division review.

R2:19-11-1012. Contract Dates.

For each professional and consultant service contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:

(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the Department of Finance and Administration, Office of State Procurement, in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;

(b) All professional and consultant service contracts with a total projected contract amount, including any amendments or possible extensions, of fifty thousand dollars (\$50,000) or more, unless specifically excepted, must be filed with the Department of Finance and Administration for review by the Legislative Council or Joint Budget Committee.

R1:19-11-1013. Reporting of Vendor Performance.

Contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) or more shall require the submission of a vendor performance report at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract. Reports shall be due to the Office of State Procurement. This shall not restrict agencies from submitting an unsatisfactory vendor performance report at any time during the contract period. Agencies shall submit vendor performance reports using the appropriate method as prescribed by the Office of State Procurement.